

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY
NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 18 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0347
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GIOVANNI ROGERS,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200400139

Honorable Stephen F. McCarville, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Lynn T. Hamilton

Mesa
Attorney for Appellant

E S P I N O S A, Judge.

¶1 In June 2005, appellant Giovanni Rogers was placed on probation after he was convicted pursuant to his plea of no contest to transporting a narcotic drug for sale. On appeal from the revocation of probation, Rogers contends the evidence was insufficient to support the court's finding that he violated certain conditions of probation. He also asserts the court abused its sentencing discretion when it revoked probation and sentenced him to an aggravated prison term of ten years. We affirm.

Factual and Procedural Background

¶2 Rogers was charged with transportation of a narcotic drug for sale and possession of a narcotic drug for sale. In December 2004, pursuant to a plea agreement, he pled no contest to the transportation charge. The trial court accepted the plea, suspended the imposition of sentence, and placed Rogers on three years' probation. The plea agreement included the following conditions: Rogers was to meet with his probation officer every month, submit to random urine testing, and participate in and successfully complete substance abuse counseling.

¶3 In December 2005, the state filed a petition to revoke probation, alleging Rogers had committed fifteen violations of his probationary terms. Following a violation hearing, the trial court found Rogers had violated probation as the state had asserted in eleven of the fifteen allegations, including failing to submit to drug testing on multiple occasions, failing to meet with his probation officer for several months, and failing to attend and

complete drug counseling. At a combined disposition and aggravation/mitigation hearing, the court revoked probation and sentenced Rogers to the aggravated, ten-year prison term.

Sufficiency of the Evidence

¶4 Rogers first contends the state failed to introduce sufficient evidence to prove he violated probation. The evidence presented at a violation hearing need only establish by a preponderance the allegations in the petition. Ariz. R. Crim. P. 27.8(b)(3). “We will uphold a trial court’s finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence.” *State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (App. 1999). Simply because the parties present conflicting testimony does not mean the evidence is insufficient. *Id.* Rather, it is for the trial court to resolve any conflicts in the evidence and assess the credibility of witnesses in the process. *Id.*

Probation Regulations

¶5 At the outset, Rogers contends “the [s]tate failed to meet its burden o[f] proof . . . by failing to admit the regulations [of probation] into evidence at the [v]iolation [h]earing.” The record, however, belies that contention. The state submitted, as an exhibit at the violation hearing, the “Regulations of Probation,” which Rogers’s probation officer explained at the hearing he “use[s] whenever [he] go[es] over the regulations with a defendant.”¹

¹Rogers only argues the state did not submit the Regulations of Probation at the violation hearing, not that he never received a copy of them. As we note below, Rogers’s

¶6 Relying on *State v. Robinson*, 177 Ariz. 543, 869 P.2d 1196 (1994), Rogers also contends “it was error to revoke probation for a condition or term of probation not reduced to writing.” However, Rogers did not raise this issue below. When a probationer fails to raise an issue at his violation hearing, that issue is considered waived. *See State v. Peralta*, 175 Ariz. 316, 318, 856 P.2d 1194, 1196 (App. 1993); *see also Robinson*, 177 Ariz. at 544 n.2, 869 P.2d at 1197 n.2 (stating that the court of appeals could have precluded the issue of lack of written notice on appeal because the defendant failed to object on that basis at the trial court level). Accordingly, this court only reviews the record and issues for fundamental error. *Peralta*, 175 Ariz. at 318, 856 P.2d at 1196.

¶7 In *Robinson*, the trial court found the defendant had violated terms of probation by not participating in a specific counseling program pursuant to his probation officer’s verbal order that he do so. 177 Ariz. at 544, 869 P.2d at 1197. The court of appeals affirmed, but on review, the supreme court reversed, finding that, under the criminal rules, a “defendant cannot be found to have violated a term of his probation unless he has received written notice of the term allegedly violated.” 177 Ariz. at 543, 869 P.2d at 1196.

¶8 That Rogers received written notice of the conditions of probation is clear. He signed the regulations, which included an acknowledgment that he understood them and agreed to comply with them. Among the conditions in the regulations was to “[r]eport to the

signature appears on the Regulations of Probation admitted into evidence at the violation hearing.

probation officer every month,” “[s]ubmit to random urine testing at the direction of any probation officer,” and “[a]ctively participate in and successfully complete [s]ubstance [a]buse counseling” in a specifically identified program. Accordingly, we find no fundamental error under *Robinson*.

¶9 Rogers next argues the trial court incorrectly found there was sufficient evidence he had violated these three conditions. We address each in turn.

Monthly Meetings

¶10 At the violation hearing, the probation officer testified he had met with Rogers in June 2005 and had explained the conditions of his probation to him at that meeting. The probation officer also conducted an in-home visit in June. The two scheduled an appointment for July, but Rogers failed to attend that meeting. After attending the August meeting, Rogers failed to attend his September and October meetings. The probation officer then made an in-home visit in November. Rogers, on the other hand, testified the probation officer had gone to Rogers’s home three times and Rogers’s work site twice, which he believed satisfied his monthly meeting requirements. The court found the probation officer’s testimony more credible. We cannot say that the court’s finding was “arbitrary or unsupported by any theory of evidence.” *Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d at 114.

Counseling

¶11 Rogers contends that PEP counseling “did not follow[up]” with him, nor did it “identify an area of concern which required counseling intervention,” suggesting this

excused his failure to attend and complete counseling. However, it was not PEP's duty to "follow[]up" with Rogers or determine whether he should go through counseling. *Cf. State v. Elmore*, 174 Ariz. 480, 483, 851 P.2d 105, 108 (App. 1992) (rejecting probationer's contention that his expulsion from a substance abuse treatment program was an "involuntary act" excusing violation of his probation terms). Again, Rogers received and indicated he understood the regulations he signed as part of his probation, which included the requirement that he "[a]ctively participate in and successfully complete" counseling. He cannot now place the blame on others for his failure to comply with this regulation. *See Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d at 114-15 (explaining trial court was free to disregard probationer's excuse for failing to attend a substance abuse treatment program that the "session was scheduled for [a different] day"); *Elmore*, 174 Ariz. at 483, 851 P.2d at 108. The trial court did not err in finding Rogers had failed to comply with this condition of probation.

Drug Testing

¶12 Rogers was also required to "[s]ubmit to random urine testing at the direction of any probation officer." The state alleged in the petition to revoke that Rogers had failed to submit to drug testing as directed from late August 2005 through October 3, 2005. The probation officer testified that Rogers was to be drug tested every Monday, and that the last time he did so was on Monday, August 22, 2005.

¶13 Rogers contends it was unclear which urinalysis program he was to use and he believed he had complied with this requirement. Rogers again relies on *Robinson*, citing it

for the proposition that “a violation of probation premised on failing to satisfy an oral directive of a[] . . . [p]robation [o]fficer . . . [is] error.” Again, Rogers did not raise this issue below and we review it only for fundamental error. *Peralta*, 175 Ariz. at 318, 856 P.2d at 1196.

¶14 Rogers asserts the probation officer “did not sufficiently identify the [drug testing] program [Rogers] was to use” and that “[t]he staff at the test site simply never set [Rogers] up on the color-call system.” He further states that once a month had passed “without agency follow[up],” he “reasonably concluded” additional testing was no longer required. Such assertions do not explain how any oral directives he received were insufficient or like those examined in *Robinson*. And, in any event, here, unlike in *Robinson*, the conditions of probation expressly directed that Rogers regularly participate in a specifically identified drug-testing program. Accordingly, we conclude the trial court did not commit any error, let alone fundamental error, in finding Rogers violated the drug testing allegations in the petition to revoke.

Sentencing

¶15 Rogers argues the trial court abused its discretion when it sentenced him to an aggravated, ten-year prison term. The trial court has broad discretion when imposing a sentence, and its decision will not be disturbed absent a clear abuse of discretion, which includes failure to adequately investigate the facts that are relevant to determining the appropriate sentence. *See State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985).

Relying on *State v. Baum*, 182 Ariz. 138, 893 P.2d 1301 (App. 1995), Rogers asserts that the court improperly “predetermined any probation violation would result in a sentence to the Department of Corrections,” which “deprived [him] of an opportunity for the trial court to weigh the nature of the violations and circumstances surrounding the violations to create a just result.”

¶16 *Baum* is inapposite. There, the trial court had informed the defendant that if he violated probation, the court would sentence him to the maximum aggravated prison term. The defendant violated probation and the court subsequently sentenced him as promised. On appeal, the court found this sentencing method “contrary to law” because it constituted punishment for the violation of probation and not the original offense and demonstrated the trial court had failed to consider “all pertinent mitigating and aggravating circumstances.” *Id.* at 140, 893 P.2d at 1303. Here, the plea agreement provided that, if Rogers violated probation, he would be sentenced to a prison term of, at a minimum, five years. Rogers voluntarily agreed to this plea and its conditions. Moreover, unlike in *Baum*, the court here heard and considered mitigating and aggravating factors before rendering its sentence. Accordingly, Rogers has not demonstrated the court improperly imposed the sentence or otherwise abused its broad sentencing discretion.

Conclusion

¶17 For the foregoing reasons, we conclude the trial court did not err in finding Rogers had violated the terms of his probation and did not abuse its discretion in revoking probation and sentencing him to the aggravated term of ten years' imprisonment. Affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge